NO. 42224-7

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BRANDON MCWILLIAMS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stephanie Arend

No. 10-1-03135-1

BRIEF OF RESPONDENT

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Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdictions

Constitutional Provisions

Statutes

Rules and Regulations

Other Authorities

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exercise its discretion in ruling the testifying codefendant's pretrial statement to law enforcement was admissible as a prior consistent statement under ER 801(d)(1)(ii) when it rebutted defendant's charge of recent fabrication and consisted of information that was otherwise admissible as statement of identification under ER 801(d)(1)(iii)?

2. Should defendant's sentence be affirmed when the challenged conditions that he cooperate with the department of corrections, maintain law abiding behavior, and forfeit unclaimed seized property were within the trial court's discretion to impose?

B. STATEMENT OF THE CASE.

1. Procedure

On July 26, 2010, the Pierce County Prosecutor's Office filed an information charging appellant, BRANDON MCWILLIAMS ("defendant") with two counts of firearm enhanced first degree assault (Counts I-II), one count of second degree assault (Count III), and one count of unlawful possession of a firearm in the first degree (Count IV). CP 1-3. Aggravating factors were alleged in Counts I-III. CP 1-3.

The Honorable Stephanie A. Arend presided over the trial. RP 1. The State called codefendant Alighwa Henderson ("Henderson") as a

witness. RP 538. Defendant impeached Henderson's trial testimony as being influenced by his plea agreement with the State. RP 557-559. The State endeavored to rebut that impeachment by eliciting Henderson's consistent pre-agreement statements from the detective who interviewed him. RP 683. Defendant objected on the basis of hearsay. RP 683. The trial court overruled defendant's objection, finding that the testimony was admissible as a prior consistent statement under ER 801(d)(1)(ii).[1] RP 694,703. The challenged testimony was admitted. RP 703-709.

Defendant was convicted of three counts of second degree assault, unlawful possession of a firearm in the first degree, and two firearm enhancements. CP 318-324, 326. The Court imposed sentence on June 10, 2011. CP 328-341. Defendant's standard range was 63 to 84 months

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[1] **ER 801.** Definitions[:] The following definitions apply under this article: (a) Statement. A "statement is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion. (b) Declarant. A "declarant" is a person who makes a statement. (c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. **(d)** ***Statements Which Are Not Hearsay***. A statement is not hearsay if— (1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or **(ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication, or improper influence or motive,** or (iii) one of identification of a person made after perceiving the person; or (2) Admission by Party –Opponent. The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." (emphasis added for the reader's convenience).

as to each of the three second degree assault convictions and 57-75 months as to the conviction for unlawful possession of a firearm in the first degree. CP 331. The Court imposed a high end sentence on each count and ordered those sentences be served concurrently. CP 334. The firearm enhancements resulted in a statutorily required 72 month consecutive sentence. CP 331. The court ordered defendant to cooperate with the department of corrections and maintain law abiding behavior; the court also ordered the forfeiture of unclaimed property seized in his case. CP 333. Defendant filed a timely notice of appeal on June 10, 2011. CP 344.

2. Facts

In the evening hours of July 25, 2010, defendant was drinking alcohol at a social gathering with his child's mother, Amber Pacheco-Noel ("Amber),[2] Amber's mother, Kimberly Pacheco ("Kimberly"), and his friend, Henderson. RP 283, 312, 327, 439-440, 538-539, 771-772, 774-775, 812, 817-819. The gathering was held inside Kimberly's Pierce County residence at the Drake apartment complex. *Id.* Defendant, Amber, and Henderson walked approximately two blocks to a 7-Eleven at the street intersection of 96th and Steele around midnight. RP 365-366,

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[2] The State's response will refer to Amber Pacheco-Noel and Kimberly Pacheco by their first names to avoid confusion. No disrespect is intended.

438-439; 540-541, 549, 564, 778-779, 797, 814-815, 819, 829; Ex. 1-3, 21A.

Marqise Labee ("Labee") and Lamar Reynald ("Reynald") were selling CDs[3] outside the 7-Eleven when the three arrived. RP 541, 589-592, 649, 651-652; 21A. Defendant approached Labee and Reynald and said: "I don't care if this is 96th" and "something about Piru[.]" RP 365, 438-439; 541, 549, 564, 653; Ex. 2-3, 21A. Detective Miller testified "Piru" is a subset of the Blood street gang. RP 736-737. 96th and Steele is the known territory of the rival street gang "BGD"("Black Gangsta Disciples"). RP 741. Detective Miller explained defendant's remark was consistent with a territorial challenge that meant: "I don't care whose hood[4] this is ... it's mine." RP 752. Reynald believed defendant mistook him for a gang member. RP 654.

Amber and Henderson walked into the 7-Eleven. RP 542, 830; Ex. 21A. Defendant remained outside to argue with Reynald and Labee. RP 542-543, 592; Ex. 21A. Henderson rejoined the argument on defendant's behalf. RP 543-544; Ex. 21A. A physical altercation ensued. RP 544-545, 654; Ex. 2-3, 21A. Defendant punched Labee in the face, causing him to lose consciousness. RP 592-594, 654, 897; Ex. 21A. Amber ran outside to pull defendant from the fight. RP 365, 438-439; 541, 549, 564,

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[3] Compact Disks ("CDs").
[4] "Hood": Noun, slang for Neighborhood. *See* Dictionary. reference.com /brows /hood?s =t (2012).

592-594, 654, 832; Ex. 21A. Defendant produced a nine millimeter ("9mm") pistol and walked toward Reynald. RP 289, 546-547, 568, 920; Ex. 2-3, 21A. Defendant pulled back on the pistol's "slide" as if to chamber a 9mm cartridge for firing. RP 289, 546-547, 568, 920; Ex. 2-3, 21A. That action caused a previously chambered 9mm cartridge to eject from the pistol; the unfired cartridge was subsequently recovered by police. RP 289, 305-306; 919, 920-921; 17, 21A. Defendant fired a bullet in Reynald's direction. RP 285-287, 492, 547, 568, 594, 655-658; Ex. 17, 21A, 31.

The bullet shattered a store window behind Reynald. RP 285-287, 313, 316, 595-596. Reynald's neck was either lacerated by the rebounding glass debris or grazed by the bullet. RP 285-287, 313, 316, 595-596. The bullet traveled through a store clerk's leg. RP 285-287, 315, 633-634, 889; Ex. 17. A second clerk called 911 and identified the shooter as a white male. RP 635; Ex. 21A, 31. Defendant is a tall Caucasian male; he was wearing a white baseball hat, a white shirt, and a pair of white shorts at the time. RP 365, 438-439; 541, 549, 564, 814, 829; Ex.2-3, 9, 21A. Henderson is an African American male; he was wearing a blue shirt, blue hat, and blue jeans. RP 541, 549, 815-816, 829; Ex. 12, 21A. Reynald and Labee are also African American males. RP 825, 829, 838, 845; Ex. 2-3, 21A. The 7-Eleven security video confirmed defendant was the only

Caucasian male involved in the incident. RP 293, 364, 384-385, 549, 825, 829, 831-832, 838, 845; Ex. 2-3, 21A.[5]

Defendant fled toward the Drake apartments with Amber and Henderson. RP 283, 365, 438-439; 541, 549, 564,547, 839, 845-846; Ex. 21A. A nurse working across the street from the 7-Eleven saw a male matching defendant's description running toward the Drake with a gun in his hand; a female matching Amber's description was running beside him. RP 283-284, 304, 328, 581-585, 820-821, 839-840, 844; Ex. 1, 21A.

Police responded to the vicinity of the shooting within minutes. RP 281-283, 312, 322, 495-497; 21A. Amber and Henderson were apprehended as they ran toward the Drake. RP 283-284, 326, 335, 497, 548, 823, 839; 21A. Police watched Amber throw her jacket in a bush moments before she was detained. RP 283-284, 304, 328, 820-822. Amber testified she altered her appearance to avoid police detection. RP 822-823. Police briefly detained Henderson in a vacant lot adjacent to the Drake. RP 304-305, 340-341, 431, 547-548. Henderson identified defendant as the shooter. RP 553-556, 573. Officers observed Kimberly run from the Drake toward the 7-Eleven in her underwear as she

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[5] The images recorded by the outside cameras are "pixilated;" general characteristics such as gender, complexion, and clothing are observable, but facial features are less clear. RP 364, 394-395; Ex.2-3, 21A.

screamed: "what did my babies do ... where is my daughter?" RP 431-436, 783, 797.

Police responded to Kimberly's apartment. RP 322, 437-440. Police contacted defendant at the front door. RP 332, 343, 437-439. Defendant was shirtless wearing a pair of white shorts. RP 438; Ex. 18, 21A. A white baseball hat was observed on Kimberly's kitchen table. RP 439, 773, 816; Ex. 21A. Police located a white shirt on the sidewalk approximately fifteen feet outside Kimberly's rear sliding glass door. RP 367-368, 378, 439; Ex. 15, 21A. Defendant was taken into custody. RP 344, 439.

Kimberly consented to a search of her apartment. RP 439-440, 788, 797. Police located seven unfired 9mm cartridges in Kimberly's kitchen; testing at the Washington State Patrol Laboratory confirmed four of those 9mm cartridges had been cycled through the same pistol as the unfired 9mm cartridge police recovered from the 7-Eleven after the incident. RP 289-290, 440-441, 919-920; Ex. 16-17. Kimberly told police the 9mm cartridges found in her kitchen "likely" belonged to defendant.

RP 882.[6] Defendant's felony history made it unlawful for him to possess firearms and ammunition. RP 277-278.[7]

Medical personnel responded to the 7-Eleven. RP 281-283, 312, 322, 495-497, 634, 659. The injured store clerk, Paul Kimani ("Kimani") and Reynald were transported to the hospital. RP 634-635, 642, 659, 889. A treating physician determined the bullet passed within centimeters of Kimani's "superficial femoral artery." RP 892. Kimani walked with a limp for over a month; his scars had not healed by the time of his testimony. RP 645. Reynald's scar had also failed to heal by the time of trial. RP 659.

The defense rested without calling witnesses. RP 932.

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[6] Kimberly denied identifying the 9mm cartridges as defendant's on the night of the incident while testifying, yet conceded they did not belong to her, Amber or her granddaughter. RP 788-789.

[7] RCW 9.41.040; 18 U.S.C. § 922 (1) (federal offense for convicted felons to possess ammunition).

C. ARGUMENT.

1. THE CHALLENGED EVIDENTIARY RULING WAS A PROPER EXERCISE OF THE TRIAL COURT'S DISCRETION; THE ASSOCIATED TESTIMONY WAS ADMISSIBLE AS BOTH A PRIOR CONSISTENT STATEMENT UNDER ER 801(d)(1)(ii) AND A STATEMENT OF INDENTIFICATION UNDER ER 801(d)(1)(iii).

Washington's appellate courts will only reverse a trial court's decision on whether to admit or exclude evidence when the ruling was an abuse of discretion. ***State v. Thomas***, 150 Wn.2d 821, 856, 83 P.3d 970 (2004) (*citing* ***State v. Swan***, 114 Wn.2d 613, 658, 790 P.2d 610 (1990); ***Reese v. Stroh***, 128 Wn.2d 300, 310, 907 P.2d 282 (1995). A trial court abuses its discretion if no reasonable person would have decided the matter as the trial court did. ***Thomas***, 150 Wn.2d at 856 (*citing* ***State v. Castellanos***, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997)). This requires a showing that the trial court's evidentiary ruling was "manifestly unreasonable." ***State v. Hughes***, 118 Wn. App. 713, 724, 77 P.23d 681 (2003) (*citing* ***State v. Brown***, 132 Wn.2d 529, 571-572, 940 P.2d 546 (1997) *cert denied*, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998)). The unreasonableness is manifest when it is "obvious, directly observable, overt or not obscure...." *See generally* ***State v. Taylor***, 83 Wn.2d 594, 598, 521 P.2d 699 (1974).

Identity was the principal issue in dispute at defendant's trial. RP 276-277, 557-559, 562-565, 569-570, 1068-1075, 1077. Defendant was

predominately identified as a perpetrator of the charged offenses through circumstantial evidence. RP 283-284, 289-290, 304-305,326-328, 332, 335, 343, 367-368, 378, 431-439, 440-441, 497, 783, 797, 820-823, 839, 919-920; Ex. 1-3, 9, 12, 15-18, 21A.[8] Defendant's co-defendant ("Henderson") was the only witness to testify that defendant participated in the incident. RP 276-277, 547-548; CP 1-3. Henderson was called by the State pursuant to a plea agreement entered on January 18, 2011. RP 573-574.

Henderson had identified defendant as participating in the charged offenses during two pre-agreement interviews with law enforcement. RP 341-346, 572-573, 683, 697, 704. When the incident occurred on July 25, 2010, Henderson told the officer who briefly detained him that defendant was responsible for the shooting. RP 341-346, 553-556, 572-573. Henderson was arrested on July 29, 2010, after being charged as defendant's accomplice. RP 697; CP 1-3. Henderson was interviewed by Detective Nist on August 2, 2010. RP 683, 704-709. Henderson again disclosed that he was present at the 7-Eleven with defendant when the incident occurred; but claimed he never saw defendant with a firearm. *Id.* Henderson was not offered any consideration for his statements to police. 341-346, 553-556, 572-573, 683, 704-709.

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[8] "[T]he law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other." CP 278 (Instruction No. 7).

Defendant first commented on the credibility of Henderson's anticipated testimony during opening statement:

> "The only individual that puts my client at the scene is Alighwa Henderson, and through testimony and cross examination it will be shown that he has worked a deal with the prosecutor to come in here and testify, and in return for that testimony against my client, he's going to walk out of jail probably before the end of the month. So he has great incentive to point the finger at my client to exonerate himself."

RP 276-277.

Defendant began his cross-examination of Henderson by calling attention to the terms of his plea agreement:

[Defendant]	"Good afternoon, Mr. Henderson."
[Henderson]	(No response.)
[Defendant]	"How much time were you looking at if you'd been convicted as charged?"
[Henderson]	"Of which charges?
[Defendant]	"As you were first charged ... Assault 1 and two Assault 2s; is that correct ...?
[Henderson]	"Yes."
[Defendant]	"How much time were you looking at? ... Give me an estimate."
[Henderson]	"25 years, 30 years ..."
[Defendant]	"And now you're walking out with less than a year in jail, aren't you?"
[Henderson]	"Yeah."
[Defendant]	"And you get that deal by coming in here and testifying against my client, don't you?"
[Henderson]	"Yep." ...
[Defendant]	"And as you were charged ... if you were convicted ... this would have been a second strike, wouldn't it?
[Henderson]	"Yes."

[Defendant] "So you would have been one strike away from life in prison including 20 to 25 years, correct?"
[Henderson] "Yes."
[Defendant] "That all goes away by coming in here and testifying against my client, correct?"
[Henderson] "Yes."

RP 557-559. Defendant posed several leading questions that implied Henderson was the shooter. RP 562-565. Defendant questioned Henderson about his pre-agreement statements to police. RP 569-570. The substance of those statements was introduced as evidence without objection during redirect examination. RP 572-573.

The State called Detective Nist as a witness and posed the following question:

"Did Mr. Henderson indicate to you whether or not Mr. McWilliams was involved in this incident?"

RP 683. Defendant objected on the basis of "hearsay." *Id.*

The trial court initially sustained defendant's objection. RP 683-691. The jury was excused. *Id.* The State argued the challenged testimony was admissible as a prior consistent statement under ER 801(d)(1)(ii) and a statement of identification under ER 801(d)(1)(iii). RP 683-684. Defendant qualified his objection by conceding the State could elicit Henderson's prior inconsistent statements from Nist. RP 692. The court ruled the testimony was admissible as a prior consistent statement but declined to allow it as a statement of identification. RP 694-703. The

challenged testimony was introduced as evidence; no limiting instruction was requested. RP 705-709.

a. The trial court properly exercised its discretion when it ruled the challenged testimony was admissible as a prior consistent statement.

ER 801(d)(1)(ii) provides:

> "A statement is not hearsay if—(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is ... (ii) consistent with his testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive[.]"

"Whether a prior statement is admissible under ER 801(d)(1)(ii) is within the trial court's discretion and will not be reversed absent a showing of manifest abuse of discretion. ***State v. Makela***, 66 Wn. App. 164, 168, 831 P.2d 1109 (1992) (*citing* ***State v. Dictado***, 102 Wn.2d 277, 290 687 P.2d 172 (1984), *overruled on other grounds*, ***State v. Harris***, 106 Wn.2d 784, 789-790, 725 P.2d 975 (1986); ***State v. Osborn***, 59 Wn. App. 1, 5, 795 P.2d 1174, *review denied*, 115 Wn.2d 1032, 803 P.2d 325 (1990)).

The foundational requirements of ER 801(d)(1)(ii) were satisfied before the challenged testimony was admitted. Henderson was subject to cross-examination. RP 557-572, 575. The challenged statement was consistent with Henderson's trial testimony as to the disputed issue of whether defendant was the white male observed fighting at the 7-Eleven when the charged assaults occurred. RP 276-277, 538-541, 549, 705-706,

1068-1075, 1077. The threshold requirements of cross-examination and consistency were met.[9]

The challenged testimony also rebutted defendant's charge that Henderson's his plea agreement motivated him to testify falsely. RP 276-277, 557-559, 1068-1075, 1077. A charge of improper influence occurs when a party "raise[s] an inference sufficient to allow counsel to argue the witness had a reason to fabricate her story later." *See* ***Thomas***, 150 Wn.2d at 865; ***Makela***, 66 Wn. App. at 168 (*quoting* ***State v. Bargas***, 52 Wn. App. 700, 702-703, 763 P.2d 470 (1988), *review denied*, 112 Wn.2d 1005 (1989)).[10] Identifying the source of the alleged improper influence is critical to a determination of whether a prior consistent statement is properly admitted under ER 801(d)(1)(ii). *See* ***Thomas***, 150 Wn.2d at 865; ***State v. Walker***, 38 Wn. App. 841, 843, 690 P.2d 1182 (1985); ***Makela***, 66 Wn. App. at 168; ***State v. Bargas***, 52 Wn. App. 700, 702-703, 763 P.2d 470 (1988), *review denied*, 112 Wn.2d 1005 (1989)). Once an event is proffered as having an improper influence on a witness's

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[9] Defendant conceded Henderson's prior inconsistent statements to Nist were admissible. RP 692. At trial Henderson testified he saw defendant with a gun at the 7-Eleven, as he had when he first discussed the shooting with the officer who detained him on the night of the incident. RP 546-547, 555. Henderson told Detective Nist he did not see defendant with a gun at the 7-Eleven. RP 709. Defendant questioned Henderson about that inconsistency during direct and cross examination. RP 565-570.

[10] "If there is an inference raised in cross examination that the witness changed her story in response to an external pressure, then whether that witness gave the same account of the story prior to the onset of the external pressure becomes highly probative of the veracity of the witness's story given while testifying." ***Thomas***, 150 Wn.2d at 865 (*citing* ***State v. McDaniel***, 37 Wn. App. 768, 771, 683 P.2d 231 (1984).

testimony that charge may be rebutted with a consistent statement made by the witness before the proffered event occurred. *See generally* ***Thomas***, 150 Wn.2d at 865; ***Makela***, 66 Wn. App. at 172-174; *see also* ***State v. Walker***, 38 Wn. App. 841, 843, 690 P.2d 1182 (1985); ***State v. Ellison***, 36 Wn. App. 564, 569, 676 P.2d 531 (1984); ***United States v. Tome***, 513 U.S. 150, 156, 115 S. Ct. 696, 130 L. Ed. 2d 574 (1995).

Defendant proffered the plea agreement as a motive for Henderson to testify falsely about defendant's involvement in the charged assaults. RP 276-277, 557-559, 1068-1075, 1077. Defendant's opening statement explicitly characterized Henderson's anticipated testimony as an unreliable byproduct of that agreement. RP 276-277. This preemptive method of charging recent fabrication is analogous to the voir dire that supported the admissibility of a prior consistent statement in ***Thomas***. *See* 150 Wn.2d at 865 ("[A]t various times during voir dire Thomas reiterated his concern with whether people who enter into plea agreements have a motive to lie by questioning jurors as to their thoughts on snitches.")[11]

Defendant's cross-examination of Henderson was also comparable to cross-examination that supported the applicability of ER 801(d)(1)(ii) in ***Thomas***.[12] RP 557-565. Thomas' cross-examination concentrated on how the life sentence attending the witness's initial charge had been reduced by

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[11] *See also, e.g.*, ***State v. Rivers***, 129 Wn.2d 697, 707-709, 921 P.2d. 495 (1996) (defense counsel's opening statement subject to impeachment).
[12] 150 Wn.2d at 865.

plea agreement to approximately thirty six months. 150 Wn.2d at 865. Thomas coupled that cross-examination with questions that implied the plea agreement motivated the witness to testify falsely. *Id.* Defendant's cross-examination similarly emphasized that Henderson's plea agreement reduced his exposure from a lengthy prison sentence to just under a year in jail. RP 557.[13] Defendant concluded that line of questioning by posing a rhetorical question that implied Henderson had testified falsely to benefit from that arrangement: "That all goes away by coming in here and testifying against my client, correct?" RP 557-559. ER 801(d)(1)(ii)'s foundational requirement of an express or implied charge of recent fabrication was also met.

Defendant's summation reasserted that the plea agreement was the reason Henderson accused defendant while testifying:

> "The motives of Mr. Henderson to accuse my client? Mr. Henderson's not new to the system ... Somebody gets confronted with something, [sic] I didn't do it, I didn't do it, ...That's natural. [The prosecutor] asked why would [Mr. Henderson] throw ... Mr. McWilliams under the bus? Why wouldn't he? He was looking at 25 years to 30 years, and he's out today ... His incentive, approximately 9,000 days. That's the amount of time he would be serving if he had gotten 25 to thirty years, and that's the bottom line. 9,000 days is his incentive."

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[13] The entirety of this portion of defendant's cross-examination is provided in detail on page 12, *supra.*

RP 1077. This argument unmistakably identified the plea agreement as an external influence that transformed Henderson's "natural" inclination to deny any involvement into a willingness to place defendant at the 7-Eleven as a participant in the charged assaults.

Defendant challenges the trial court's evidentiary ruling by claiming that Henderson had a motive to falsely accuse defendant when the charged assaults occurred. App. Br. at 21.[14] That claim is not supported by the record[15] and its truth would not have any bearing on the admissibility of the challenged testimony. *See* ER 801; ***Thomas***, 150 Wn.2d at 865; ***Makela***, 66 Wn. App. at 173. ER 801(d)(1)(ii) does not require proof that the prior consistent statement was made at a time when the declarant was peculiarly prone to honesty. *See* ER 801; ***Thomas***, 150 Wn.2d at 865; ***Walker***, 38 Wn. App. 841, 843; ***Makela***, 66 Wn. App. at

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[14] Defendant first objected to the challenged testimony on the basis of hearsay; he did not initially object on the ground that the State had failed to meet the foundational requirements of ER 801(d)(1)(ii). RP 683. The State introduced its theory of admissibility as a prior consistent statement under ER 801(d)(1)(ii). Defendant responded to the State's argument by secondarily claiming that Henderson's motive to fabricate extended beyond the plea agreement to the night of the incident. RP 701.

[15] The record shows Henderson was defendant's friend of several years and that he had been enjoying defendant's hospitality before the shooting, as he had in previous times of need. RP 538-539, 555, 570-571. Henderson manifested a motive to protect defendant during the interview with Nist. Henderson understood defendant's culpability was being imputed to him under a theory of accomplice liability. RP 572-573; CP 1-3. That is why Henderson did not tell Nist about defendant's firearm possession. *Id.* Henderson was not confronted with the dilemma of having to accuse defendant to exculpate himself while dealing with police as he was never in danger of being confused for the white male who struck Labee and shot at Reynald. RP 304-305, 340-341, 365, 431, 438-439, 541,547-549, 553-559, 564,573, 814-816, 829; Ex.2-3, 9, 12, 21A.

168,173-174; ***Tome***, 513 U.S. at 157-158.[16] Otherwise "[p]rior consistent statements would become inadmissible every time the party against whom they were offered proffered a motive, however baseless, for the declarant to fabricate the statement at the time [the witness] made it." ***Makela***, 164 Wn. App. at 173.

The record does not demonstrate any abuse of discretion. Defendant singled the plea agreement out as a motive for Henderson to fabricate his trial testimony in opening statement, laid foundation for that theory through cross-examination and relied on that theory in summation. RP 276-277, 557-559, 1077. The trial court acted well within its discretion when it ruled the challenged testimony was admissible to rebut defendant's claim.

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[16] Defendant conflates ER 801(d)(1)(ii)'s temporal requirement with the rational for admitting excited utterances under ER 803(a)(2). App.Br. at 22 (*citing* ***State v. Brown***, 127 Wn.2d 749, 758-759, 903 P.2d 459 (1995); *see also* ***Thomas***, 150 Wn.2d at 865; ***Makela***, 66 Wn. App. at 174; ***State v. Grover***, 55 Wn. App. 252, 258, 777 P.2d 22 (1989); *see also* ***State v. Cooley***, 48 Wn. App. 286, 738 P.2d 705, *review denied*, 109 Wn.2d 1002 (1987); ***State v. Simmons***, 63 Wn.2d 17, 385 P.2d 389 (1963); ***United States v. Owens***, 484 U.S. 554, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988) (interpreting the federal equivalent of ER 801(d)(1)). The excited utterance exception is based on the theory that the stressful circumstances temporarily overcome the ability to reflect and consciously fabricate. *See* ***State v. Dixon***, 37 Wn. App. 867, 872, 684 P.2d 725 (1984). The logical corollary is that proof of fabrication demonstrates the declarant was not sufficiently affected by the identified stressor for her hearsay statements to qualify as "excited utterances" under the rule.

b. The challenged testimony was admissible as a statement of identification under ER 801(d)(1)(iii).

The challenged ruling should also be affirmed on the ground that the challenged testimony was a proper statement of identification admissible under ER 801(d)(1)(iii).[17]

Pursuant to ER 801(d)(1)(iii) "[a] statement is not hearsay if the declarant testifies at trial ... is subject to cross-examination concerning the statement, and the statement is ... one of identification of a person made after perceiving the person." A witness's description of the offense is also admissible under this exception to the extent necessary to make the identification understandable to the jury. ***State v. Stratton***, 139 Wn. App. 511, 517, 161 P.3d 448 (2007) (*citing* ***Porter v. United States***, 826 A.2d 398, 410 (D.C. App.2003); *see also* ***United States v. Owens***, 484 U.S. 554, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988) (interpreting the federal equivalent of ER 801(d)(1)). Statements of identification may include "statements identifying the various physical characteristics of a person perceived by the witness, or the composite of all those physical

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[17] The prevailing party need not cross-appeal a trial court ruling within the time allowed by RAP 5.1(d) if it seeks no further affirmative relief. ***State v. Kindsvogel***, 149 Wn.2d 477, 480-481, 69 P.3d 870 (2003) (*citing* ***McGowan v. State***, 148 Wn.2d 278, 60 P.3d 67 (2002)). "It is [the appellate court's] duty to affirm if the judgment of the trial court can be sustained upon any ground, whether it is ... [a] groun[d] stated by the trial court or not." ***State v. Morales***, 173 Wn.2d 560, 580, 269 P.3d 263 (2012) (*citing* ***State v. Carroll***, 81 Wn.2d 95, 101, 500, P.2d 115 (1972)).

characteristics, which is no more than the sum of the parts perceived." ***Stratton***, 139 Wn. App. at 517 (*citing* ***Commonwealth v. Weichell***, 390 Mass. 62, 72, 453 N.E.2d 1038 (1983); ***Commonwealth v. Morgan***, 30 Mass.App.Ct. 685, 573, N.E.2d 989, 992 (1991)); *see also* ***State v. Grover***, 55 Wn. App. 252, 256-259, 777 P.2d 22 (1989). "The rule is based on a presumption that identification, shortly after an incident, will be more reliable than a later identification in court. 5D Karl B. Tegland, Wash. Prac.: Courtroom Handbook on Washington Evidence author's cmts. at 414 (2011-2012 ed.) (*citing* ***State v. Bockman***, 37 Wn. App. 474, 682 P.2d 925 (1984)).

The challenged evidence was an admissible statement of identification under ER 801(d)(1)(iii). Henderson was subject to cross-examination at trial. RP 557. The evidence established Henderson was in a position to perceive defendant when the charged assaults occurred. RP 538-541, 546-547, 549, 705-708; 21A. The identification properly included a description of defendant's physical characteristics and clothing. RP 705-708; *See* ***Stratton***, 139 Wn. App. at 517. And Henderson's general description of the circumstances surrounding his observations was reasonably necessary for the jury to appreciate that he was identifying

defendant as the white male fighting at the 7-Eleven when the charged assaults occurred. *Id.*[18]

c. Any error associated with the challenged ruling was harmless

Even if defendant could prove his claim of error it would not serve as a ground for reversal since it could not be construed as prejudicial. *See* ***State v. Cunningham***, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). Nonconstitutional evidentiary error is not prejudicial unless, within reasonable probability, had the error not occurred, the outcome of the trial would have been materially affected. [19] *See* ***Cunningham***, 93 Wn.2d at 831; *see also* ***State v. Halstien***, 122 Wn.2d 109, 127, 857 P.2d 270 (1993)

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[18] Defendant seems to argue statements of identification are inadmissible under ER 801(d)(1)(iii) absent "some type of out-of-court identification procedure." App.Br. at 25. That interpretation of the rule is irreconcilably at odds with the authority defendant relies upon. *See* ***Grover***, 55 Wn. App. at 255. ***Grover*** explicitly declined to read the requirement of formal identification procedures into the rule. *Id.*
Defendant also draws a false dichotomy between "statements of accusation" and "statements of identification." *See* App.Br. at 25. It is difficult to imagine anything more inherently accusatorial than a victim singling out another human being as his or her assailant, yet that is precisely the type of evidence contemplated by the rule. *See* ***Grover***, 55 Wn. App. at 255 (witness identified Grover as the robber); ***Stratton***, 139 Wn. App. at 514 (witness identified Stratton as one of the armed men in a first degree assault case); *see also* ***Owens***, 484 U.S. at 556 (victim identified Owens as his attacker).

[19] Defendant makes the general assertion that non-constitutional harmless error standard is satisfied when the erroneously admitted evidence was "important in corroborating the claims of the state's main witness." App.Br. at 17 (*citing* ***State v. Sweeney***, 45 Wn. App. 81, 86, 723 P.2d 551 (1986). ***Sweeney*** cannot be fairly read as supporting the "important corroboration" rule proposed by defendant as such a rule would be contrary to the non-constitutional harmless error standard which looks to whether there is reasonable probability the outcome of the trial would have been materially affected had the error not occurred. *See* 45 Wn. App. 85-86. That standard requires a review of all the evidence adduced in support of a defendant's conviction; it does not review the corroborating potential of a particular piece of evidence in isolation. *See* ***Sweeny***, 45 Wn. App. 84-86.

(*citing* ***State v. Tharp***, 96 Wn.2d 591, 599, 637 P.2d 961 (1981); ***Bargas***, 52 Wn. App. at 705;[20] ***State v. Stark***, 48 Wn. App. 245, 249-250, 738 P.2d 684 (1987); ***Ellison***, 36 Wn. App. at 569.

Defendant cannot prove that he was prejudiced by the admission of the challenged evidence because that information was independently presented to the jury, without objection, during Henderson's testimony.[21] RP 550-557, 569-570, 572-575. [22] Neither party requested a limiting instruction as to that testimony, so it was proper for the jury to consider it for any relevant purpose. RP 550-557, 946- 974, 983- 988, 994, CP 38-79, 85-87, 88-139, 140-197, 208-268, 269-317; *see* ***State v. Myers***, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997) (*citing* ***Lockwood v. AC & S, Inc.***, 109 Wn.2d 235, 255, 744 P.2d 605 (1987)). At worst, the challenged testimony reiterated facts that were already in evidence. *See* ***Stark***, 48 Wn. App. at 249-250 (Harmless error when jury was otherwise exposed to the substance of erroneously admitted testimony).

Defendant's qualified objection to the challenged evidence was also too narrow to preclude the jury from hearing the testimony he

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[20] Harmless error to admit prior consistent statements when declarant was present at trial and defendant elicited details about the declarant's challenged hearsay statements.
[21] The challenged testimony consisted of Henderson's pre-agreement description of the charged incident to Detective Nist. RP 705-709.
[22] Defendant raised on objection during the State's redirect examination, claiming that the State's use of the word "truthful" confusing. Defendant's objection was overruled. RP 574.

identifies as prejudicial on appeal. App.Br. at 17-18; *See* ER 103(1);[23] RAP 2.5(a). Defendant only objected to the admission of Henderson's prior consistent statement to Nist; he conceded Henderson's inconsistent statements to Nist were admissible and did not request an instruction to limit their use. RP 692; *see **Myers***, 133 Wn.2d at 36. The challenged consistent statement and the conceded inconsistent statements were alike in that they tended to prove the disputed issue of identity by placing defendant at the scene of the crime. RP 539-541, 546-547, 550-557, 569-570, 572-575, 692, 705-709. The conceded inconsistent statements only substantively differed from challenged consistent statement in that the inconsistent statements included additional information about whether defendant brandished a firearm when he was there. *Id.* Since the central fact communicated by the challenged testimony—defendant's presence at the crime scene during the shooting—would have survived defendant's

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[23] ER 103. Rulings on Evidence. (a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context; or (2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked (b) Record of Offer and Ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The court may direct the making of an offer in question and answer form. (c) Hearing of the Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury. (d) Errors Raised for the First Time on Appeal. [Reserved—*See* RAP 2.5(a)].

qualified objection, the trial court's ruling could not have affected the outcome of the trial. *See* ***Ellison***, 36 Wn. App. at 569 (Harmless error when jury could have inferred the consistency between statements from other evidence).

There is also no reason to assume the challenged testimony unduly influenced the jury. The jury was properly instructed on how to evaluate witness credibility and separately instructed on the special concerns attending the testimony of a cooperating accomplice. CP 270 (Instruction No. 1), 277 (Instruction No. 5).[24] It is presumed that the jury followed those instructions. *See* ***State v. Weber***, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). The State explicitly directed the jury to its instruction on accomplice testimony during summation before arguing that Henderson should only be believed in so far as his testimony was corroborated by the independent evidence of defendant's guilt. RP 1023-1024, 1025-1033, 1050. The persuasiveness of that evidence makes it unreasonable to maintain that the challenged ruling deprived defendant of an acquittal. RP 283-284, 289-290, 326, 332-335, 343, 367-368, 378, 431-441, 497, 542, 548, 581-585, 635, 773-777, 783, 797, 812, 815-816, 819, 823, 839, 919-

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[24] Instruction No. 5. "Testimony of an accomplice, given on behalf of the State, should be subjected to careful examination in light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt."

920; Ex. 9, 12, 15-17, 21A, 31. Defendant has failed to prove the challenged ruling prejudiced the outcome of his trial.

2. DEFENDANT RECEIVED A LAWFUL SENTENCE THAT SHOULD BE AFFIRMED.

Defendant claims the sentencing court exceeded its authority when it imposed the following three conditions:

> "(1) Conditions per DOC;[25] CCO;[26]
> (2) Law abiding behavior;
> (3) Forfeit all property seized"

CP 334; App. Br. at 28.[27] Defendant claims the condition referencing the department of corrections was an impermissible delegation of the court's sentencing authority. App. Br. at 36. Defendant also argues the forfeiture condition violated his right to due process. App.Br. at 27.

The Washington Supreme Court has held that "in the context of sentence ... illegal or erroneous sentences may be challenged for the first time on appeal." ***State v. Bahl***, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (citations omitted). Appellate courts apply the abuse of discretion

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[25] Department of Corrections ("DOC").
[26] Community Corrections Officer ("CCO").
[27] "Under this State's determinant sentencing scheme, once a defendant has been convicted of a felony, the sentencing judge determines the defendant's standard range sentence based on the seriousness level of the current offense and the defendant's offender score." ***State v. Jones***, 159 Wn.2d 231, 236, 149 P.3d 636 (2006) (*citing* RCW 9.94A.530(1), .510). If an offender is sentenced to the custody of the department of corrections for a "violent offense" the court shall, in addition to the other terms of sentence, sentence the offender to community custody for eighteen months. RCW 9.94.701. Assault in the Second Degree is a "violent offense." RCW 9. 94A.030 (54).

standard of review to conditions of sentence crafted by the court. ***State v. Valencia***, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010). A sentencing court abuses its discretion when its conditions are manifestly unreasonable. *Id.* Unreasonableness is "manifest" when it is "obvious, directly observable, overt or not obscure...." *See generally* ***State v. Taylor***, 83 Wn.2d 594, 598, 521 P.2d 699 (1974).

a. The conditions of sentence requiring defendant to cooperate with the department and maintain law abiding behavior are not ripe for review.

"Washington sentencing courts are required to impose certain community custody conditions in specified circumstances and may impose others." ***State v. Bahl***, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (*citing* RCW 9.94A.712(6)(a)(i);.715(2)(a); .700(4); (5)). Preenforcement challenges to community custody conditions are ripe for review when the issue raised is primarily legal, further factual development is not required, and the challenged action is final. *See* ***Valencia***, 169 Wn.2d at 786 (*citing* ***Bhal***, 164 Wn.2d at 751). Appellate courts will also consider the hardship to the parties of withholding court consideration. *Id.* For example, conditions that place immediate restrictions on the offender's conduct without the necessity of State action have been considered ripe for review. *Id.* at 789.

Community custody conditions that require State action "are not ripe for review until the State attempts to enforce them as their validity depends on the particular circumstances of the attempted enforcement. *Id.* at 789 (*citing e.g.*, ***State v. Zeigenfuss***, 118 Wn. App. 110, 113-115, 74 P.3d 1205 (2003) (financial obligations not ripe for review until collection attempted); ***State v. Massey***, 81 Wn. App. 198, 200-201, 913 P.2d 424 (1996) (condition subjecting defendant to search not ripe for review until search conducted); ***State v. Phillips***, 65 Wn. App. 239, 243-244, 828 P.2d 42 (1992)).

Sanctions imposed on an offender for violating community custody are subject to judicial review. *See e.g.*, RCW 9.94A.737(2)(b); *see also* ***State v. Zimmer***, 146 Wn. App. 405, 416-417, 190 P.3d 121 (2008). Appellate courts will not speculate about hypothetical situations where the department may unlawfully administer an offender's supervision due to the availability of post-enforcement review. *See* ***Zimmer***, 146 Wn. App. at 417.

Defendant's pre-enforcement challenge to his community custody conditions is not ripe for review. The conditions do not raise an issue that is primarily legal. The trial court is empowered to order eligible offenders to comply with the administrative regulations promulgated by the department pursuant to its legislatively delegated authority. *See* RCW 9.94A.510(1), .530, .701, .704; ***Valencia***, 169 Wn.2d at 792-93; ***Bahl***, 164 Wn.2d 739, 744; ***Jones***, 159 Wn.2d at 236; ***State v. Sansone***, 127 Wn.

App. 630, 642, 111 P.3d 1251 (2005). "The department may require the offender ... to obey all laws." RCW 9.94A.704(4).

The challenged condition did not place immediate restrictions on defendant's conduct beyond those attending his status as a person lawfully committed to the department's supervisory authority. *See* RCW 9.94A.510(1), .530, .701, .704.[28] The challenged condition did not direct the department to act in excess of its statutory authority. It is therefore fundamentally different than the court-created condition the department was ordered to enforce in ***Valencia***. 169 Wn.2d at 795 (court-created condition prohibiting Valencia's possession of "paraphernalia" held unconstitutionally vague).

Additional facts must be developed before review is possible. The challenged condition merely directed defendant to comply with the department's administrative authority during his sentence. There is no record of the department imposing conditions in excess of its discretion. It is expected and lawful for a sentencing court to order a prison bound defendant to follow the department's legislatively authorized directives

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[28] *See also e.g.*, DOC 420.155 (Offender movement will be regulated in prisons to maintain facility control and security); DOC 420.310 (department's procedures for searching offenders to control contraband); DOC 420.320 (Searches of facilities conducted randomly to minimize introduction of contraband).

throughout the duration of sentence. This assignment of error is not ripe for review.

b. The challenged community custody conditions are not an impermissible delegation of sentencing authority.

"Sentencing courts have the power to delegate some aspects of community placement to the [department of corrections]. While it is the function of the judiciary to determine guilt and impose sentences, the execution of the sentence and the application of the various provisions for mitigation of punishment and the reformation of the offender are administrative in character and are properly exercised by an administrative body, according to the manner prescribed by the legislature." ***State v. Sansone***, 127 Wn. App. 630, 642, 111 P.3d 1251 (2005) (*citing* ***State v. Mulcare***, 189 Wash. 625, 628, 66 P.2d 360 (1937); *see also* ***State v. Autrey***, 136 Wn. App. 460, 469, 150 P.3d 580 (2006). Washington's courts remain empowered to ensure the proper exercise of the delegated authority through judicial review of any sanctions imposed by the department. *See* RCW 9.94A.737(2)(b); *see also* ***Zimmer***, 146 Wn. App. at 416-417.

Pursuant to RCW 9.94A.704(1) "[e]very person who is sentenced to a period of community custody shall report to and be placed under the supervision of the department ...." "The department shall assess the offender's risk of reoffense and may establish and modify additional

conditions of community custody based upon the risk to community safety. RCW 9.94A.704(2)(a). "The department may [also] require the offender ... to obey all laws." RCW 9.94A.704(4). "The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court imposed conditions." RCW 9.94A. 704(6).

The trial court did not impermissibly delegate its sentencing authority to the department; it exercised its authority by ordering defendant to comply with conditions the department was legislatively authorized to impose. *See* RCW 9.94A.702, .704, .737(2)(b); *see also* ***Zimmer***, 146 Wn. App. at 416-417; ***Sansone***, 127 Wn. App. at 642. The challenged condition put defendant on notice that violations of his supervision could result in judicial sanction. It is not liable to executive overreaching as judicial sanctions require judicial action. *See generally* RCW 9.94A.737(2)(b); *see also* ***Zimmer***, 146 Wn. App. at 416-417. The challenged condition was not an impermissible delegation.

Nor was it manifestly unreasonable for the court to order defendant to comply with his supervision while maintaining law abiding behavior. The sentencing court may impose and enforce crime-related prohibitions as a condition of an offender's community custody. RCW 9.94A.505(8); RCW 9.94.700(5)(e). "Crime-related provisions during the period of community custody following release from total confinement further the purposes of the Sentencing Reform Act of 1981 ... which include

imposition of just punishment, protection of the public, and offering the offender an opportunity for self-improvement." ***State v. Autrey***, 136 Wn. App. 460, 467, 150 P.3d 580 (2006) (*citing* ***State v. Letourneau***, 100 Wn. App. 424, 431, 997 P.2d 436 (2000)).

The jury convicted defendant of three counts of second degree assault, two firearm enhancements, and unlawful possession of a firearm in the first degree for offenses he committed in June, 2010. CP 328, 331. At the time of the offenses defendant's criminal history consisted of convictions for first degree unlawful firearm possession (June, 2008), second degree burglary (February, 2008), and second degree robbery (March, 2006). CP 331. Second degree assault and second degree robbery are "most serious offense[s]," so defendant has the potential to receive a life sentence if he commits similar offenses upon release. CP 334; RCW 9.94A.030(32)(b), (o), .570. Defendant's criminal profile demonstrates that the protection of the public, and any chance he may have for self-improvement, are dependent on his steadfast adherence to the terms of his supervision as well as his future obedience to the law. The trial court's community custody conditions are reasonable and should be affirmed.

d. Defendant has failed to prove the trial court abused its discretion by ordering the forfeiture of unclaimed property.

A sentencing court may refuse to return seized property when it is no longer needed for evidence if: (1) the defendant is not the rightful owner; (2) the property is contraband; or (3) the property is subject to forfeiture pursuant to statute. ***City of Walla Walla v. $401,333.44***, 164 Wn. App. 236, 244, 262 P.3d 1239 (2011); ***State v. Alaway***, 64 Wn. App. 796, 798, 828 P.2d 591 (1992).[29] CrR 2.3(e) governs motions for the return of seized property. ***Alaway***, 64 Wn. App. at 798 (*citing* ***State v. Marks***, 114 Wn.2d 724, 732, 790 P.2d 138 (1990)). Pursuant to CrR 2.3(e) a person aggrieved by the State's post-conviction retention of seized property may move the court for the return of the property on the basis that the movant is lawfully entitled to possession. *See generally* ***Marks***, 114 Wn.2d at 732; ***Alaway***, 64 Wn. App. at 798.[30]

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[29] CrR 2.3(e) Motion for Return of Property. "A person aggrieved by an unlawful search and seizure may move the court for the return of the property on the ground that the property was illegally seized and that the person is lawfully entitled to possession thereof. If the motion is granted the property shall be returned. In a motion for return of property is made or comes on for hearing after an indictment or information is filed in the court in which the motion is pending, it shall be treated as a motion to suppress."

[30] The Supreme Court has set forth the following guidelines once a motion for the return of seized property has been made: (1)An evidentiary hearing is required under CrR 2.3(e) where the State and the defendant can offer evidence of their claimed right to possession; (2) The purpose of this hearing is to determine the right to possession as between the State and the defendant; (3) The State has the initial burden of proof to show right to possession; (4) Thereafter, the defendant must come forward with sufficient facts to convince the court of his [or her] right to possession. If such a showing is not made, it's the court's duty to deny the motion. ***Marks***, 114 Wn.2d at 734-735.

Defendant never moved for the return of any seized property pursuant to CrR 2.3(e) or otherwise articulated an objection to the challenged forfeiture when it was ordered. RP CP 1-350; RP 1-1114; (Sept. 21, 2010, RP 1-4); (Sept. 27, 2010, RP 1-7); (Jan. 18, 2011, RP 1-4);(Feb. 28, 2011, RP 1-6); (Apr. 4, 2011, RP 1-6); (Apr. 11, 2011, RP 1-4); (Jun. 10, 2011, RP 1-10). Defendant has similarly refrained from identifying any unlawfully retained property on appeal. App.Br. 27-35. Defendant limits his claim to an argument that the trial court lacked authority to impose the challenged condition as a matter of law. App. Br. at 27.

Defendant's legal argument fails because the trial court is authorized to order the forfeiture of lawfully seized property in three specific instances: (1) the defendant is not the rightful owner; (2) the property is contraband; or (3) the property is subject to forfeiture pursuant to statute. ***City of Walla Walla v. $401,333.44***, 164 Wn. App. at 244. CrR 2.3(e) has been interpreted as placing the initial burden on showing superior right of possession on the State, yet the rule contemplates a defendant who has moved for the return of seized property. ***Marks***, 114 Wn.2d at 734-735. Defendant has not, and does not assert any possessory interest in the property at issue in his case. That fact distinguishes this case from the cases he relies upon in support of this assignment of error. *See e.g.,* ***Walla Walla***, 164 Wn. App. 236 (movant claimed to be the owner of money seized by police); ***Alaway***, 64 Wn. App. at 798-799

(motion for return of property, ownership prior to seizure not in dispute).

CrR 2.3(e) provides that a defendant *may* move for the return of seized property. The rule does not compel a criminal defendant to raise such a claim when it is disadvantageous to his defense. CrR 2.3(e). For instance, a defendant may refrain from asserting a cognizable interest in personal property when it tends to implicate her in a crime. *See generally* ***City of Seattle v. Stalsbroten***, 138 Wn.2d 227, 232, 978 P.2d 1059 (1999) (right against self-incrimination protects a defendant from being compelled to provide evidence of a "testimonial or communicative nature") (*citing* ***Schmerber v. California***, 384 U.S. 757, 761, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966)). Appellate courts have similarly recognized that due process permits a properly notified defendant to acquiesce in default judgments in order to tactically settle property rights. ***R.R. Gable, Inc.***, 32 Wn. App. 749, 754, 649 P.2d 177 (1982) (*citing* ***Sheldon v. Sheldon***, 47 Wn.2d 699, 289 P.2d 335 (1955); *see also* CR 55).

Identity was the predominate issue at defendant's trial. RP 276-277, 557-559, 562-565, 569-570, 1068-1075, 1077. His defense required that he disassociate himself from the seized property as it tended to establish his guilt. RP 380, 417, 464-465, 570-571, 789-790, 1069; *e.g.*, Ex.2-3, 9, 15-18, 21A.

Tactical considerations aside, nearly all of the seized property was clearly contraband as to defendant or subject to competing claims. The

seized ammunition could not be lawfully returned to defendant due to his felony history. RP 277-278, 440-441; CP 1-3, 328-341; Ex. 16-17; 18 U.S.C. § 922 (1). Police discovered the remaining property at the 7-Eleven store or in the vicinity of Kimberly Pacheco's apartment. RP 285-287, 293, 315, 364-368, 380, 384-385, 417, 427, 438-440, 451. A pair of white shorts consistent with the shorts worn by the shooter were recovered from defendant's person, yet he elected to remain silent about their ownership. Ex. 18; 21A.

The trial court did not abuse its discretion when it ordered the forfeiture of property defendant never claimed when he had notice and an opportunity to do so. A motion for return of property may be made at any time. *See* ***State v. Card***, 48 Wn. App. 781, 786, 741 P.2d 65 (1987); *see also e.g.*, CrR 2.3(e); CR 55(c)(1). Defendant must make a motion in the trial court pursuant to CrR 2.3(e) if he is prepared to claim a property interest in specific items of evidence collected in his case.

D. CONCLUSION.

Defendant failed to establish that either the challenged evidentiary ruling or conditions of sentence were an abuse of the trial court's discretion. His convictions and sentence should be affirmed.

DATED: May 8, 2012

MARK LINDQUIST
Pierce County
Prosecuting Attorney

JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant ~~and appellant~~ c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5.9.12 Noreen Kar
Date Signature

PIERCE COUNTY PROSECUTOR

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